Supreme Court, U.S.
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No. 85-490

In The
Supreme Court of the United States
October Term, 1985

MELBOURNE E. JOSEPH, SR., ET AL,
Petitioners,

v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,
Respondents.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Did the United States Court of Appeals for the Fifth Circuit err in finding that individuals who accept a lump-sum retirement from an ERISA covered Pension Plan lack standing to assert ERISA violations affecting their pension benefits and reflecting a breach of duty committed by the Trustees?

II.

Did the United States Court of Appeals for the Fifth Circuit err in not compelling the Trustees of an ERISA covered Pension Plan to submit to arbitration when the trust regulations provided for arbitration in a pension dispute and when the Trustees of the Pension Plan affirmatively agreed to arbitrate?

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In their Petition for Writ of Certiorari, the Petitioners state two grounds for review by this Court. The Respondents presented three questions but these questions are substantially the same as the two presented by the Petitioners.

The Petitioners consider the Respondents' arguments to support the Petitioners' allegations that there is conflict among the circuits and that the question is one of significance that has not been but should be decided by

this Court. The Petitioners do not intend to reargue their Petition. The Petitioners must, however, address the third question presented by the Respondents since the Respondents argument may mislead this Honorable Court.

In the Respondents' Question Presented, Number 3, they asked the following:

> Have plaintiffs waived their right to request that defendants be compelled to submit to arbitration by invoking the jurisdiction of the federal court requesting relief on the merits, and failing to request that defendants be compelled to arbitrate in any of the previous proceedings?

The Respondents cite two Circuit Court of Appeals cases and three District Court cases which they argue support their claim that the "plaintiff's action in seeking out a federal forum and requesting that the court [sic] rule on the merits of their claim waive any right to compel the defendants to arbitrate." Respondents' Brief In Opposition To Petition for Writ of Certiorari, at 16.

To correct the Respondents' misstatement, the Petitioners offer the following from their complaint:

> Complainants aver that the Plan and its Trustees have violated the provisions of the Pension Trust Document and the Employee Retirement Income Security Act by failing to comply with the provisions of the Appeals Procedure in cases of this type . . . .
>
> . . . .
>
> Complainants aver that the Plan and its Trustees have wholly, callously, and wantoning failed to comply with the provisions of the Trust Document and Appeals Procedure and have not filed a reaffirmation of their prior decision to arbitrate said dispute and claim, nor have they chosen to implement the Ar-

> bitration Procedure as provided for in the Trust Document . . . .
>
> . . . .
>
> WHEREFORE, PREMISES CONSIDERED, Complainants sue, demand, and pray for judgment of and from the Defendants for the sum of . . . $310,000.00 to be awarded to each of the complainants . . . . *Further, your Complainants pray that this Honorable Court will order and direct that the Defendants, in the alternative, implement the Grievant/Arbitration Procedure* . . . .

(Emphasis Added.) Clearly, the Petitioners prayed, alternatively, for an order compelling arbitration. See, F.R. Civ.P. 8.

The Plan Benefits Handbook which is attached to the Complaint as part of Exhibit IV, is addressed "TO ALL PARTICIPANTS." After the trial court granted the Respondents' Motion to Dismiss, the following dialogue occurred:

> Ms. Buttross: And without or with leave to amend?
>
> The Court: Well, it's gone. [A]nd what I hope you'll do, is appeal . . . .

Transcript of Motion to Dismiss, February 1, 1984, at 24. Clearly the trial court considered all claims to lie with the "participant question." In any case, it is quite ironic, in light of Appendix G of the Petition for Writ of Certiorari, that the Respondents would claim that the Petitioners have waived arbitration when it was Respondents' ultimate refusal to arbitrate that prompted litigation.

Finally, the Petitioners quote from one of the cases cited by the Respondents in their Brief In Opposition:

> Although it is well settled that a party may, through his own conduct, waive his right to arbitration . . . whether waiver has occured or not cannot be determined by an inflexible rule and depends on all of the circumstances of the particular case. . . . However, federal policy favors arbitration, and waiver is not to be lightly inferred.

Lubrizol International v. M/V Stolt Argobay, 562 F. Supp. 565, 572 (S. D. NY 1982).

CONCLUSION

The Petitioners again respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, the Petitioners pray that this Court will summarily reverse the decision of the United States Court of Appeals for the Fifth Circuit and will remand this case to the United States District Court for the Eastern District of Louisiana.

Respectfully submitted,

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